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Ms. Kathy Hurld
Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2020-0008; FRL-10008-96-OW

Dear Ms. Hurld:

On behalf of the more than 700 state and local associations and 140,000 firms that comprise the National Association of Home Builders (NAHB), I appreciate the opportunity to comment on "Whether EPA's Approval of a Clean Water Act (CWA) Section 404 Program Is Non-Discretionary for Purposes of Endangered Species Act (ESA) Section 7 Consultation".[1] NAHB is a trade association that represents firms engaged in land development, single family and multifamily home construction, and commercial and light industrial construction projects. As such, our members routinely conduct earth moving and grading activities that may impact both federally-regulated waters and wetlands and threatened or endangered species or their habitat and, therefore, require a permit. Because of this, state assumption of the CWA Section 404 program and factors affecting builders' compliance with the ESA are critically important to many of our members.

The Florida Department of Environmental Protection (FDEP) is seeking to assume the CWA Section 404 program. In doing so, it has proposed an alternative approach for complying with the ESA that would require EPA to change its policy. Through today's request for comment, EPA has specifically asked whether it should reconsider its current position that ESA consultation is not required when EPA approves a state or tribe's request to assume the CWA Section 404 program. Although today's action is compelled by FDEP's proposal, its application would not be limited to Florida. Any change in policy would apply prospectively to any state that applies to assume the program.

Broadly, NAHB supports state assumption of the CWA Section 404 program. State assumption can eliminate redundancy between federal and state permitting requirements, better align CWA programs, and expedite permit decision timeframes. These benefits would be particularly valuable in Florida, where housing starts are forecasted to increase by more than 50 percent between 2017 and 2021.[2] However, when states are responsible for issuing dredge and fill permits, the federal link that provides access to ESA Section 7 consultation ceases to exist. As a result, permittees whose authorized activities may result in the "take" of a federally-listed species must complete the onerous ESA Section 10 permitting process.

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[1] 85 Fed. Reg. 30953 (May 21, 2020).
[2] NAHB. "Starts and Permits." Available at https://www.nahb.org/News-and-Economics/Housing-Economics/National-Statistics/Starts-and-Permits (July 6, 2020).

For this reason and others, NAHB opposes a reversal of EPA's current position. EPA's approval of a CWA Section 404 program is non-discretionary for the purposes of ESA Section 7 consultation. The existing approach is consistent with *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) ("*NAHB v. Defenders*") and current regulations. Further, the CWA Section 404(b)(1) Guidelines already include a pathway to ESA Section 7 consultation for permit applicants in states that are authorized to run the program. NAHB strongly encourages EPA to retain its current position and incorporate it into the Memoranda of Agreement (MOA) of all states seeking assumption of the CWA Section 404 program.

However, should EPA reverse its position and claim that the approval process under CWA Section 404(g) or (h) is a federal discretionary action, thereby requiring all states seeking CWA Section 404(g) assumption to first undergo a programmatic ESA Section 7 consultation, it must first address a number of existing limitations regarding the ability to extend incidental take authorizations to ensure permittees can get reasonable ESA coverage. Similarly, EPA must clarify how it will approach the many legal, procedural, and technical ESA implementation issues that could present hurdles for permit applicants under state-assumed CWA Section 404 programs.

A. BACKGROUND

The CWA prohibits the discharge of dredge and fill materials into "waters of the United States" without a permit.[3] The CWA Section 404 permitting program is a complex process that is administered by the U.S. Army Corps of Engineers (USACE) and EPA, but the CWA allows states to request authority to assume responsibility for running the program. This is done by submitting a proposal to EPA describing the state permitting program and entering into a MOA with the federal agencies.[4] The criteria and procedures for EPA approval, review, and withdrawal of delegated authority are contained in 40 C.F.R. § 233. An assumed program operates under state or tribal law, but those laws must meet CWA requirements. Further, under 40 C.F.R. § 233.20(a), state permits must comply with the environmental review criteria contained in 40 C.F.R. § 230, which are also referred to as the "CWA Section 404(b)(1) Guidelines".

Although there are many benefits, state assumption of the CWA Section 404 program also affects ESA compliance. Specifically, ESA Section 9 makes it unlawful for any person to "take" an endangered species without first obtaining incidental take authorization from the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) ("the Services").[5,6] There are two way to do so — ESA Sections 7 and 10. Section 7(a)(2) specifies that federal agencies must ensure that any action authorized, funded, or carried out by such agency (i.e., "discretionary" federal action[7]) is not likely to "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary... to be critical...." To receive an incidental take statement (ITS) under ESA Section 7, the federal action agency and the

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[3] 33 U.S.C. § 1311(a), 1344(f).
[4] 33 U.S.C. § 1344(g); 40 C.F.R. § 233.
[5] 16 U.S.C. § 1538.
[6] Under 16 U.S.C. § 1532(19), "take" is broadly defined to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a listed species.
[7] 50 C.F.R. § 402.03 (limiting applicability of ESA Section 7 to actions in which there is discretionary federal involvement or control).

Services must prepare a biological opinion ("BiOp") that quantifies the impacts to species or designated critical habitat resulting from the proposed activity and identify specific measures (i.e., reasonable and prudent measures) designed to minimize the impacts of any incidental take necessary to support the Services' decision. If there is no federal discretion, as would occur under a state-assumed CWA Section 404 program, ESA Section 10 allows the agency to authorize "take" of a species provided that "such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." This requires preparation by private landowners of a Habitat Conservation Plan (HCP) and approval by the Services under multiple criteria, including compliance with the National Environmental Policy Act.[8]

Not only are the paperwork and data requirements for each type of consultation different, there are considerable differences in processing times between the two options. Under ESA Section 7, the agency must issue a BiOp within 135 days – a timeframe that can be extended for an additional 60 days with the applicant's consent.[9] In comparison, ESA Section 10 contains no timeline for completing an HCP, but NAHB found through a Freedom of Information Act request that the process takes 2.8 years on average. Such timing is simply unworkable for most residential construction projects. Clearly, automatically requiring permittees in state assumed programs to undergo ESA Section 10 permitting is a non-starter. There needs to be an alternative pathway that can allow these permittees a reasonable process and timeframe to receive their required ESA approvals.

For this reason and others, ESA compliance is emerging as a considerable hurdle to state assumption. To date, only Michigan and New Jersey have assumed the CWA Section 404 program and neither state contains consulted as part of their assumption process. However, over the last decade, Arizona, Florida, Indiana, Kentucky, Minnesota, and Montana have expressed interest in assumption. Florida has progressed farthest in its effort and is forcing resolution to the ESA applicability issue because it contains over 130 federally-protected species[10] and impacts to nearly every acre of land across the state, including wetlands, forests, beachfront, farm fields, or existing golf courses can trigger compliance with ESA requirements.

States pursuing CWA Section 404 program assumption have proposed two broad strategies for ESA compliance. First, an "off-ramp" approach that effectively "federalizes" certain individual state-issued wetland permit applications and thereby opens a case-by-case pathway to ESA Section 7 consultation. Variations of the off-ramp approach are included in the New Jersey and Michigan MOAs. In Florida, however, FDEP believes that such an approach could limit the benefits of state assumption because of the large number of federally-listed species and acres of designated critical habitat. Thus, FDEP has proposed a programmatic approach where EPA would enter into an ESA Section 7 consultation with the Services to consider all potential impacts to federally-protected species and designated critical habitat resulting from the assumption process.[11] The FDEP proposal assumes that EPA's approval or disapproval of state assumption is a discretionary action for purposes of ESA Section 7(a)(2) and the resulting programmatic consultation would establish a process for providing incidental take coverage for future state-issued wetlands permits.

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[8] 16 U.S.C. § 1539(a)(2)(A)(i)-(iv).
[9] 50 C.F.R. § 402.14(e).
[10] FWS. Environmental Conservation Online System. "Listed Species Believed to or Known to Occur in Florida." Available at https://ecos.fws.gov/ecp0/reports/species-listed-by-state-report?state=FL&status=listed (July 6, 2020).
[11] Docket ID No. EPA-HQ-OW-2020-0008.

Unfortunately, elements of the FDEP proposal appear to be inconsistent with existing case law. Specifically, in *NAHB v. Defenders*, the Supreme Court held that ESA Section 7(a)(2)'s requirements do not apply to the approval of State National Pollutant Discharge Elimination System (NPDES) permitting programs under CWA Section 402(b).[12] In a letter dated December 27, 2010 ("Silva Memo"), then-EPA Assistant Administrator Peter S. Silva determined that the holding and rationale of *NAHB v. Defenders* applies to State program approvals under CWA Section 404, as well.[13] FDEP's proposal conflicts with the current EPA position.

Today's *Federal Register* notice requests comment on 1) whether EPA should reconsider its position that action on a state or tribal application to assume the CWA Section 404 program is non-discretionary; and 2) whether the agency can and should engage in a one-time ESA Section 7 consultation when reviewing a state or tribe's assumption request.

B. SPECIFIC COMMENTS

1.1. OPTION 1: EPA RETAINS EXISTING POSITION (CWA SECTION 404 PROGRAM APPROVAL IS NON-DISCRETIONARY)

Under EPA's first option, the agency would retain the Silva Memo and continue to apply the Court's reasoning in *NAHB v. Defenders* to the CWA Section 404 program. By maintaining its position, EPA remains consistent with CWA Section 404(g), CWA Section 404(h), the CWA Section 404(b)(1) Guidelines, and other requirements of the CWA and ESA. Further, the current position maintains a pathway to ESA Section 7 consultation, which provides many benefits to permit applicants.

1.1.1. *EPA's Current Position is Consistent with Case Law, Guiding Statutes, and Applicable Regulations*

To fully understand EPA's current position, it is important to first review *NAHB v. Defenders*. In reversing the Ninth Circuit and holding that ESA Section 7 consultation is not required for state assumption of CWA Section 402 authority, the Court relied on the plain language of CWA Section 402(b), which limits EPA's discretion to the consideration of certain specified criteria:

> Section 402(b) of the CWA commands that the EPA "shall" issue a permit whenever all nine exclusive statutory prerequisites are met. Thus, Section 402(b) does not just set forth minimum requirements for the transfer of permitting authority; it affirmatively mandates that the transfer "shall" be approved if the specified criteria are met. The provision operates as a ceiling as well as a floor. By adding an additional criterion, the Ninth Circuit's construction of Section 7(a)(2) raises that floor and alters Section 402(b)'s statutory command.[14]

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[12] 33 U.S.C. § 1342(b).
[13] Docket ID No. EPA-HQ-OW-2020-0008.
[14] *NAHB v Defenders*, 551 U.S. at 663-64.

Thus, while EPA may "exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out CWA Section 402(b)'s enumerated statutory criteria, the statute clearly does not grant it discretion to add another entirely separate prerequisite to that list."[15,16] There is little difference between the process for approving State NPDES permitting programs under CWA Section 402(b) and the process for approving State wetlands permitting programs under CWA Section 404(g) and (h). As an initial matter, the CWA begins with a statement of Congressional policy that the States "implement the permit programs under section 1342 [Section 402] and 1344 [Section 404] of this title."[17] Given this intent, it not surprising that the provisions governing the approval of State programs under both sections of the statute are similar and restrict EPA's discretion to deny or condition approval to certain specified criteria, which do not concern compliance with the ESA.

Under CWA Section 402(b), a State wishing to administer the NPDES permitting program must submit to EPA a detailed description of its proposed program and certify that the laws of such State provide authority to carry it out. This provision goes on to provide that EPA "shall approve each submitted program" unless EPA determines that the State lacks adequate authority to ensure that nine specific statutory criteria are satisfied.[18] The Supreme Court, in *NAHB v. Defenders*, relied on this language to hold that ESA Section 7 does not apply to the approval of State NPDES programs.[19]

Similarly, under CWA Section 404(g), a State wishing to administer the CWA Section 404 permitting program must submit to EPA a detailed description of its proposed program and certify that the laws of such State provide authority to carry it out.[20] EPA then must determine whether the State has the authority to satisfy eight specific statutory criteria.[21] If EPA determines that the State has the authority necessary to satisfy these criteria, EPA "shall approve the program."[22] Thus, like CWA Section 402(b), EPA's discretion under CWA Section 404(h) is limited to considering certain specific statutory criteria, none of which includes compliance with the ESA. "By its terms, the statutory language is mandatory, and the list is exclusive; if the [eight] criteria are satisfied, the EPA does not have the discretion to deny a transfer application."[23]

In addition, it is important to note that CWA Section 404(h) imposes strict time limits on the State program approval process. These deadlines would create serious timing problems if ESA Section 7 applied to that process — a further indication that it does not. For example, within 10 days of receiving

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[15] *Id.* at 671.
[16] In addition, the Court reviewed and upheld as reasonable the Services' long-standing interpretation of the scope of ESA Section 7(a)(2), set forth in 50 C.F.R. § 402.03: "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." The Court explained that the "focus on 'discretionary' actions accords with the commonsense conclusion that, when an agency is required to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species." *Id.* at 667. Thus, Section 7(a)(2)'s no jeopardy duty applies only where an agency has discretion to act, and not to actions "that an agency is required by statute to undertake once certain specified triggering events have occurred." *Id.* at 669.
[17] 33 U.S.C. § 1251(b).
[18] *Id.* § 1342(b)(1)-(9).
[19] *NAHB v. Defenders*, 551 U.S. at 661, 673.
[20] 33 U.S.C. § 1344(g)(1).
[21] *Id.* § 1344(h)(1)(A)-(H).
[22] *Id.* § 1344(h)(2)(A).
[23] *NAHB v. Defenders*, 551 U.S. at 661.

the program submission, EPA must provide copies to USACE and FWS. Those agencies must submit any comments on the program within 90 days of the date the program was submitted to EPA. Not later than 120 days after receiving the State's program submission, EPA "shall determine" whether the State has the required authority.[24] If the EPA fails to make a determination within 120 days, then the State's program "shall be deemed approved."[25] This statutory deadline undermines any argument that allowing FWS the opportunity to provide comments equates to conducting an ESA Section 7 consultation and FWS issuing a BiOp as a condition of approving a State's permitting program.

That is because ESA Section 7 consultations normally take longer than 120 days, particularly if the proposed action is a complicated program involving multiple species and a large action area (i.e., an entire state). The statutory deadline for consultation is 90 days.[26] By rule, the Services have extended the deadline by 45 days to allow additional time for drafting the BiOp.[27] This 135-day deadline, however, does not take into account the need to prepare a biological assessment and to assemble the information required by the Services to initiate formal consultation.[28] The information needed to initiate ESA Section 7 consultation is extensive, particularly if the proposed action is complicated.[29] As a result, the initiation of ESA Section 7 consultation is often delayed. In the end, ESA Section 7 consultation is lengthy and burdensome. If the CWA intended states to complete ESA consultation as a condition of assumption, its authors would have provided ample time to do so. They did not.

Clearly, the Court's reasoning in *NAHB v. Defenders* applies equally to CWA Section 402(b) and CWA Section 404(g), and is consistent with Congressional intent for the CWA.

1.1.2. *The Principal Arguments in the FDEP Proposal Lack Merit*

EPA's current position is consistent with case law and the CWA, ESA, and their implementing regulations; and thus changing the policy is unnecessary and unjustified. In its *Federal Register* notice, EPA summarized the principal arguments made in the FDEP proposal in support of applying ESA Section 7 to the approval of State CWA Section 404 permitting programs.[30] The purported justification is neither compelling nor sufficient to merit a policy reversal.

1.1.2.1. *The Opportunity to Comment Does Not Equate to ESA Section 7 Consultation*

FDEP argues that because FWS is allowed to comment on a State's program submittal, EPA must take into account the protection of threatened and endangered species in approving the State's program. Such an interpretation is wishful, at best. As an initial matter, there are two agencies that administer the ESA (i.e., FWS, NMFS), yet NMFS, which has jurisdiction over marine and anadromous species such as salmon and sturgeon, is not involved in the State program approval process.[31] Barring one of the

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[24] *Id.* § 1344(h)(1).
[25] *Id.* § 1344(h)(3).
[26] 16 U.S.C. § 1536(b)(1)(A).
[27] 50 C.F.R. § 402.14(e).
[28] *See* 16 U.S.C. § 1536(c)(1) (requiring biological assessments to be completed in 180 days).
[29] 50 C.F.R. § 402.14(c).
[30] 85 Fed. Reg. 30953 (May 21, 2020).
[31] 33 U.S.C. §§ 1344(g), (h).

agencies responsible for ESA implementation from the state approval process obviously makes no sense if Congress intended such involvement to signal a duty to consult, as FDEP's proposal contends.

Further, the State program approval process is nothing like the consultation process required by ESA Section 7 and the implementing regulations at 50 C.F.R. § 402. When a State applies for approval of its program, EPA must provide copies of the State's program description to FWS for review and comment.[32] FWS, but not NMFS, may provide comments to EPA, in writing, no later than the 90th day after the day EPA received the State's submittal.[33] EPA is required to "take into account" FWS's comments (as well as any comments submitted by USACE), but the scope of the comments is limited to determining whether the State has the authority to comply with the eight specific criteria needed for issuing CWA Section 404 permits.[34]

The ESA Section 7 consultation process is much different. Where a proposed federal action may adversely affect listed species or critical habitat, formal consultation takes place between the federal agency proposing the action, FWS, and the applicant, if any. Formal consultation begins with the federal agency's written request for consultation and concludes with FWS's issuance of a BiOp advising whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.[35] If a "jeopardy" BiOp is issued, the opinion must include reasonable and prudent alternatives to the proposed action, if any are available.[36] Otherwise, the action is prohibited by ESA Section 7(a)(2).

The BiOp also must include an ITS if FWS concludes during consultation that the proposed action (or the implementation of any reasonable and prudent alternative) is reasonably certain to take members of a listed species, but such take will not violate the ESA Section 7(a)(2) jeopardy standard.[37] The ITS must specify the following:

- The impact, i.e., the amount or extent, of the incidental take on the species.
- Any reasonable and prudent measures that the Service considers necessary or appropriate to minimize such impact.
- The terms and conditions that must be complied with by the federal agency or any applicant to implement the reasonable and prudent measures, including monitoring and reporting requirements.[38]

If the species is subject to the Marine Mammal Protection Act, the taking must be authorized under that statute as well.[39]

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[32] 33 U.S.C. § 1344(h)(2).
[33] *Id.* § 1344(h)(3).
[34] *Id.* § 1344(h)(1).
[35] *See* generally 50 C.F.R. § 402.14 (governing formal consultation).
[36] *Id.* § 402.14(h).
[37] *Id.* § 402.14(i)(1).
[38] *Id.*
[39] *Id.*

The subject matter, purpose, and processes of state program assumption under the CWA and consultation under the ESA are separate and distinct. It is incorrect to claim that one can stand in for the other.

1.1.2.2. *The CWA Section 404(b)(1) Guidelines Do Not Require ESA Section 7 Consultation*

FDEP's second major argument, that ESA Section 7 consultation is necessary to determine whether the State's CWA Section 404 program complies with the CWA Section 404(b)(1) Guidelines, is similarly misplaced. This claim is based on a single provision found in 40 C.F.R. § 230.10, which provides that "[n]o discharge of dredged or fill material shall be permitted if it: ...Jeopardizes the continued existence of species listed as endangered or threatened under the [ESA] or results in likelihood of the destruction or adverse modification of a [listed species' critical] habitat."[40] A State, in assuming the CWA Section 404 permitting program, must have the authority to issue discharge permits that comply with the CWA Section 404(b)(1) Guidelines.[41] Therefore, the argument goes, EPA must consult with FWS to determine if this requirement is met.[42]

The first problem is that 40 C.F.R. § 230.10(b)(3) imposes a substantive standard — a permit may not authorize a discharge that would jeopardize a listed species or adversely modify critical habitat. This provision does not modify the statutory requirements for review and approval of a State's CWA Section 404 program submittal or direct EPA to initiate or complete ESA Section 7 consultation as a prerequisite for approving the State's program. Instead, it directs the State to demonstrate in its program and related statement of authority, as required under CWA Section 404(g)(1) and 40 C.F.R. § 233.11, that it has authority to comply with this standard. Presumably, to do so, the State agency responsible for administering the CWA Section 404 program would conduct a review of permit applications to ensure that the proposed discharges would not result in jeopardy or adverse modification. Perhaps permit applicants would be required to submit a report regarding impacts of listed species and critical habitat. Or perhaps the State's wildlife commission would provide assistance in reviewing permit applications. Precisely how the State demonstrates its ability to meet this standard is up to the State.

But EPA need not consult with FWS to review a State's program submission and determine whether the State has adequate authority to review permit applications and determine whether the discharge being authorized would jeopardize a listed species' existence or destroy its critical habitat. In short, a State's demonstration regarding the discharge limitation imposed by 40 C.F.R. § 230.10(b)(3) is no different than the State's demonstration that it has the authority to enforce the other discharge limitations in the CWA Section 404(b)(1) Guidelines.

Finally, CWA Section 404 includes a federal oversight process that provides a backstop to ensure that the substantive standard of 40 C.F.R. § 230.10(b)(3) is met.[43] Under this oversight process, in brief, the State must provide EPA with copies of permit applications and draft permits, which EPA then provides to FWS and USACE. This allows for review of proposed permits and an opportunity to provide comments and, if appropriate, to object to the proposed permit as being outside the requirements of CWA Section 404,

[40] 40 C.F.R. § 230.10(b)(3).
[41] 33 U.S.C. § 1344(h)(1)(A)(i).
[42] 85 Fed. Reg. 30953 (May 21, 2020).
[43] 33 U.S.C. § 1344(j); 50 C.F.R. § 233.50.

including the CWA Section 404(b)(1) Guidelines. If the permit is not revised to address the objection, the permit may be issued by USACE. In that case, permit issuance is a federal action, and if listed species or critical habitat would be adversely affected, ESA Section 7 consultation would be required, but it must be emphasized that these sorts of extreme cases — where there is legitimate concern that a particular discharge of dredged or fill materials may jeopardize a species — will be very unusual.

The standard imposed in 40 C.F.R. § 230.10(b)(3) is not a valid basis to require consultation on the approval of a State's CWA Section 404 program. The regulation does not prohibit impacts to listed species or to critical habitat, nor does the regulation mandate ESA Section 7 consultation if such impacts might occur. As long as the State has developed a process to monitor impacts on listed species and critical habitat to ensure that it will not authorize discharges that would violate the jeopardy and adverse modification standards, the State has satisfied CWA Section 404(h).

1.1.3. *EPA's Current Position Maintains a Viable Pathway to ESA Section 7 Consultation*

Complying with the ESA on any project can be challenging, but when the federal nexus is lost, it can become even more problematic. Once a state takes assumption of the CWA Section 404 program, the permits it issues are not considered federal permits and many are concerned that absent the federal nexus, they will be thrust into the ESA Section 10 process. But that is not true. Importantly, the current procedures governing EPA's oversight of the wetlands permits issued by states that have assumed the program provide a vehicle for addressing incidental take, as well as the prohibition against permitting discharges that would jeopardize a listed species or adversely modify critical habitat. The pathway makes programmatic ESA Section 7 consultation on approval of the state's program, as proposed by FDEP, unnecessary.

The off-ramp approach is based on CWA Section 404(j) and EPA's implementing regulations. The CWA requires a state to provide copies of individual permit applications and draft general permits to EPA.[44] Unless review has been waived, EPA must provide copies to the Services, as well as USACE, within 10 days. The Services, in turn, review and, if deemed appropriate, submit comments on the proposed permit to EPA. [45] If necessary to conduct an adequate review, additional information on the proposed permit can be obtained from the state, including the complete administrative record.[46] EPA then uses those comments to object to the individual permit or make recommendations concerning the proposed permit. Once an objection is made, the state cannot issue the permit until the steps necessary to eliminate the objection have been completed.[47] Ultimately, if the state fails to satisfy EPA's objections or requirements for permit conditions, or fails to deny the permit, then the permit application or draft general permit is transferred to USACE for processing and permit issuance.[48]

This existing oversight process allows EPA, based on input from the Services, to "federalize" a permit by causing it to be transferred to USACE for processing. In rare cases where there is concern that a

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[44] 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(a).
[45] 40 C.F.R. § 233.50(b).
[46] *Id.* at § 233.50(c).
[47] *Id.* at §§ 233.50(d)-(f).
[48] *Id.* at § 233.50(j); *See* also 33 U.S.C. § 1344(j).

permitted activity may jeopardize the continued existence of listed species or adversely modify critical habitat, the proposed permit can be issued by USACE, in which event ESA Section 7(a)(2) would be triggered and formal consultation completed prior to permit issuance. Likewise, where members of a listed species are present in the project area and are likely to be taken (i.e., killed or injured) without authorization, the oversight process can be used to transfer the proposed permit to USACE. Again, ESA Section 7 consultation would be required, during which the impact of take on the species would be evaluated, and an ITS issued that imposes reasonable and prudent measures and terms and conditions to minimize take (including monitoring and reporting requirements).[49] If the amount or extent of incidental take is exceeded during the course of implementing the action, consultation would be reinitiated to ensure that the species is not jeopardized.[50]

In the Silva Memo, EPA specifically noted that a number of important safeguards exist in the CWA and EPA's regulations to ensure that listed species receive protection. Among other provisions, the Memo quoted from 40 C.F.R. § 233.51(b)(2), which requires EPA to review proposed state permits "with reasonable potential for affecting endangered or threatened species as determined by FWS."[51] Although not specifically describing the oversight off-ramp, it is apparent that Mr. Silva was referring to this process and its ability to be used to address ESA-related concerns, including incidental take authorization in appropriate cases. Under the off-ramp, a permit applicant could receive incidental take authorization directly, rather than receive it through a less-certain programmatic consultation.

1.2. OPTION 2: EPA REVERSES POSITION (CWA SECTION 404 PROGRAM APPROVAL IS DISCRETIONARY)

NAHB understands that EPA could reverse its current position. Under the alternative interpretation, EPA's actions in evaluating a state or tribal assumption request against the enumerated criteria found under CWA Section 404(h) would be interpreted to constitute a discretionary federal action within the meaning of ESA Section 7 consultation regulations.[52] NAHB has already discussed the reasons why we believe none of the functions performed by the agency in reviewing and approving state programs under CWA Section 404(g) and (h) should be construed as being a discretionary federal action. However, if EPA does reverse its position there are several implementation and procedural questions the agency will need to address.

1.2.1. *The Services' Regulations Preclude Incidental Take Authorizations for Future Activities Authorized Under Programmatic ESA Section 7 Consultations*

The FDEP claims in its proposal that a significant obstacle preventing more states from seeking assumption of the CWA Section 404 program is how to ensure that state wetlands permitting programs and private landowners seeking state-issued wetlands permits are protected against potential liability under the ESA Section 9 "take" prohibition. FDEP believes the best approach for resolving this potential liability risk for both the state as program administrator and landowners seeking state issued wetlands permits, is for EPA, USACE, and the Services to enter into a one-time, programmatic ESA Section 7

[49] *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1).
[50] 50 C.F.R. §§ 402.14(i)(4), 402.16(a)(1).
[51] 40 C.F.R. § 233.51(b)(2).
[52] *See* 50 C.F.R. § 402.02.

consultation as part of EPA's initial review of a state's application to assume the CWA Section 404 program.[53] According to the FDEP's reasoning, this programmatic consultation approach would allow the Services to issue a BiOp and corresponding ITS that would ensure a state's wetlands permitting program does not violate either the jeopardy or destruction or adverse modification standards. NAHB has serious concerns about whether this sort of programmatic approach would be workable.

NAHB recognizes the potential benefits if EPA and the Services were to conduct a one-time, streamlined, programmatic ESA Section 7 consultation during EPA's review of Florida's assumption request. According to FDEP, this would result in an ITS for both the state's wetland permitting program and private landowners who subsequently seek state-issued CWA Section 404 wetlands permits. Unfortunately, the existing ITS regulations for programmatic consultations indicate that FDEP's preferred approach is disfavored and likely unworkable.

Specifically, in 2015, the Services amended their ESA Section 7 regulations (50 C.F.R. § 402) to address certain issues related to ITS.[54] One of the issues addressed was authorizing incidental take in BiOps for "programmatic actions." In the preamble to the final rule, the Services emphasized that during a programmatic ESA Section 7 consultation, the agency lacks necessary site-specific details on where, when, and how, listed species and their habitat would be affected by the future project-level actions authorized under the federal program.[55] The lack of specific detail and information about future take would make the amount and extent of take speculative, precluding development of an accurate and reliable trigger for the re-initiation of consultation in the programmatic BiOp.[56] Further, the agencies reasoned, programmatic actions do not actually authorize future site-specific actions that cause take, thus, the Services concluded that programmatic ESA Section 7 consultations generally should not include ITS for future site-specific actions that may be authorized under the program.[57]

The problems described in the 2015 rulemaking are critical limitations on the ability of the Services to issue valid and workable ITS via programmatic ESA Section 7 consultations. Notwithstanding FDEP's proposal, it is unclear how EPA and the Services could complete a one-time programmatic consultation on Florida's wetlands permitting program that could effectively provide ESA incidental take authorization for both the State's wetland permitting program and private landowners who subsequently apply for state wetlands permits. In fact, instead of clarifying how this might be achieved, the final rule for issuing ITS as part of programmatic consultations created a new definition for "framework programmatic action" that explains how the process works. Importantly, this definition does not support FDEP's goals.

> *Framework programmatic action* means, for purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out **and subject to further section 7 consultation.**[58]

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[53] Docket ID No. EPA-HQ-OW-2020-0008.
[54] Incidental Take Statements, 80 Fed. Reg. 26832 (May 11, 2015).
[55] *Id.* at 26833, 26835.
[56] *Id.* at 26835.
[57] *Ibid.*
[58] 80 Fed. Reg. 26835 (May 11, 2015); (codified at 50 C.F.R. § 402.02).

Therefore, even if EPA and the Services were to engage in a programmatic ESA Section 7 consultation on approval of the state's assumption request, the resulting BiOp would not include an ITS sufficient to protect both the state as program administrator and private landowners subsequently seeking state permits from the risks of ESA incidental take liability. Instead, this rule envisions that private landowners would still need to undergo separate consultations on their individual permit applications to obtain ITS. Given this limitation, NAHB questions how, from the perspective of a private landowner, Florida's preferred approach for obtaining ITS coverage would be significantly different from the existing off-ramp envisioned under CWA Section 404(j) and EPA's permit oversight regulations. The Services would still have to review the landowner's proposed action at the project-level to evaluate the impacts to listed species (i.e., the amount or extent of take) and properly authorize incidental take coverage.

1.2.2. *Programmatic ESA Section 7 Consultation for CWA Section 404(g) Assumption Imposes Additional Regulatory Burdens*

Requiring EPA and the Services to undergo programmatic ESA Section 7 consultation when a state seeks CWA Section 404(g) assumption will impose additional regulatory burdens with minimal benefits. First, the agencies will spend significant time and resources collecting data and conducting analyses yet not be able to provide definitive answers. Second, it is unlikely that the result of a formal consultation will provide states and private landowners with the incidental take protection they seek. And, at the same time, the programmatic framework created during ESA Section 7 consultation will undoubtedly impose new requirements and restrictions on those seeking state wetlands permits to avoid a "jeopardy" or "adverse modification" determination.

For example, if a BiOp includes an ITS, the Services must specify reasonable and prudent measures that are considered necessary or appropriate to minimize take, and mandatory terms and conditions that must be complied with by the federal agency and any permit applicant, including monitoring and reporting requirements. [59] These conditions and requirements would necessarily become binding requirements of the underlying state wetlands permitting program. They may include, for example, permit restrictions, mandatory habitat avoidance measures, and additional monitoring and reporting requirements. These additional requirements that the state must impose and enforce are likely to discourage some states from seeking assumption of the CWA Section 404 permitting program.

Again, from NAHB's perspective, if private landowners still need to undergo ESA Section 7 consultation and their projects are subjected to extensive conditions and requirements to minimize potential impacts on listed species in order to obtain incidental take authorization, it is unclear how requiring the Services to consult during the state assumption process is preferable to the existing state wetlands permit off-ramp approach.

[59] 50 C.F.R. § 402.14(i).

1.2.3. *Details for Conducting Programmatic Section 7 Consultations and Subsequent Approvals Lacking*

If EPA decides to withdraw the Silva Memo and require all states seeking assumption of the CWA Section 404 permitting program to complete a programmatic ESA Section 7 consultation, there are a number of technical and procedural questions that need to be addressed regarding the scope and structure of such consultation. The answers to these questions will allow NAHB, our members, and other stakeholders to better understand how this approach could affect state wetlands permitting programs and private landowners that would depend on these state programs for permits for their projects.

1. The proposed federal action that would be subject to ESA Section 7 consultation is EPA's approval of Florida's permitting program under CWA Section 404(g) and (h). Does EPA maintain that this approval is likely to adversely affect listed species or designated critical habitat? If not, what is the legal basis for engaging in formal consultation under ESA Section 7, which applies to discretionary federal actions that adversely affect listed species or critical habitat?

2. Does EPA believe its consultation with the Services regarding Florida's assumption of the CWA Section 404 permitting program constitutes a framework programmatic consultation as defined in 50 C.F.R. § 402.02? If so, does EPA know whether the Services will issue an ITS notwithstanding the limitations on extending incidental take coverage in framework programmatic consultation (*See* 50 C.F.R. § 402.14(i)(6))? If not, what are the parameters of the consultation that will occur? Have the agencies discussed this issue?

3. Is EPA's approval of Florida's CWA Section 404 permitting program likely to result in the incidental taking of species listed under the ESA? If species will not be incidentally taken as a result of EPA's approval of Florida's permitting program, what activities will the ITS cover?

4. Will EPA be responsible for any incidental take that occurs in the future as a result of activities authorized by state-issued CWA Section 404 permits? If not, on what basis would these activities be included in the ITS for the approval of Florida's CWA Section 404 permitting program?

5. How will the impact (i.e., amount or extent), of incidental take resulting from discharge activities authorized by FDEP be specified in the ITS for such permitting program given that these activities will occur in the future?

6. How will the "trigger" for the re-initiation of consultation under 50 C.F.R. § 402.14(i) and 402.16(a)(1) be determined in the ITS for the approval of Florida's CWA Section 404 permitting program? In other words, how will the amount of incidental take for listed species be determined and at what point will the authorized amount be considered to have been met or exceeded?

7. If the authorized amount of incidental take is exceeded and ESA Section 7 consultation must be reinitiated, will EPA consult again with the Services? In that event, will Florida's ability to issue CWA Section 404 permits be affected? Finally, how might the holders of existing state permits with authorized but uncompleted activities be affected?

8. The ESA specifies that consultation also must be reinitiated if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered or if a new species is listed or critical habitat designated that may be affected by the identified action (*See* 50 C.F.R. § 402.16(a)(2), (4)). If either of these events occur, how will EPA reinitiate consultation? In that event, will Florida's ability to issue CWA Section 404 permits be affected? Finally, how would holders of existing state permits with authorized but uncompleted activities be affected?

9. How will holders of state-issued CWA Section 404 permits be assured that they have incidental take coverage under the ITS?

10. What monitoring and reporting requirements might be imposed on the holders of state-issued CWA Section 404 permits? For example, how will the impacts (i.e., amount or extent) of take resulting from permitted activities be monitored?

11. How will holders of state-issued CWA Section 404 permits be notified if/when the amount or extent of authorized incidental take has been exceeded? Will the amount or extent of authorized incidental take for a species be determined on an individual permit/project basis, or will it be determined on a state- or program-wide basis?

12. Does EPA envision imposing additional conditions and requirements on holders of state-issued CWA Section 404 permits to minimize impacts on listed species and critical habitat, beyond any terms and conditions necessary minimize and monitor take under 50 C.F.R. § 402.14(i)?

13. The FDEP proposal seems to envision the creation of a post-program-approval coordination process similar to the process created in 2014 in connection with EPA's adoption of the Cooling Water Intake Structure Rule[60] ("CWIS Rule"). Under that process, the Services would review all state permit applications and draft general permits and would have the authority to impose measures to avoid and mitigate impacts on listed species under the guise of providing "technical assistance."

    a. How does EPA reconcile the inclusion of the ITS in the 2014 BiOp on the CWIS Rule with the problems associated with issuing ITS in connection with consulting on programmatic actions discussed in the Services' 2015 rulemaking on ITS[61]?

    b. Is the goal of the coordination process adopted in the BiOp and ITS on the CWIS Rule to eliminate or reduce effects on listed species and critical habitat, regardless of whether incidental take is likely?

        i. If a coordination process similar to the process adopted in the CWIS Rule BiOp and ITS is adopted here, will activities that are unlikely to cause incidental take be subjected to conditions and requirements to avoid or minimize impacts on listed species or their

[60] 79 Fed. Reg. 48300 (Aug. 15, 2014).
[61] 80 Fed. Reg. 26832 (May 11, 2015).

critical habitat? If so, what is the legal basis doing so? Will a permit applicant be able to contest these conditions and requirements, for example, if the applicant believes that the conditions and requirements are excessive or arbitrary?

ii. If a coordination process like the process adopted in the BiOp and ITS on the CWIS Rule is adopted here, will individual permit applicants be allowed to dispute or opt out of incidental take coverage if they believe that their discharge-related activities are unlikely to result in incidental take?

Clearly, there are numerous practical and legal issues that must be considered before EPA decides how to proceed and resolved if EPA takes the programmatic consultation route. NAHB believes these issues, coupled with the limitations of the current FWS/NMFS policy, strongly support EPA maintaining its current position.

C. CONCLUSION

Again, thank you for considering these comments on whether EPA approval of a state's request to assume the CWA Section 404 program is non-discretionary for the purposes of ESA Section 7 consultation. State assumption stands to provide many benefits to builders and developers, and NAHB strongly supports Florida's assumption of the CWA Section 404 program. However, NAHB neither supports withdraw of the Silva Memo nor supports the position that consultation under ESA Section 7 is necessary when a state seeks program assumption. NAHB believes existing case law, regulations, and Congressional intent support maintaining EPA's current position.

Should you have any questions or require additional information, please contact Evan Branosky, Program Manager, Environmental Policy, at ebranosky@nahb.org or (202) 266-8662.

Best Regards,

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